In the

UNITED STATES SUPREME COURT

October Term, 1941

No. .....

PHIL CHADWICK, ET AL, *Petitioners*

vs.

UNITED STATES OF AMERICA

SUPPORTING BRIEF

To the Honorable the Supreme Court of the United States:

In support of their petition for Writ of Certiorari the Petitioners respectfully show to the Court:

I.

OPINION OF THE COURT BELOW

The opinion of the United States Circuit Court of Appeals in this case has not yet been reported, but it appears in the record at page 931.

II.

JURISDICTION

(a) The opinion below was handed down on February 18, 1941; petition for Rehearing was denied on March 20, 1941.

(b) This Court has jurisdiction under 28 U.S.C.A., 347 (a). The jurisdiction of this Court is invoked upon the following ground:

1. In overruling Appellants' General Demurrer and Motion to Quash, their Petition for Severance, and Petition to require the United States District Attorney to elect upon which count, or counts he would prosecute each of these petitioners, the United States Circuit Court of Appeals for the Fifth Circuit decided an important question in the administration of Federal criminal justice in a way in conflict with the applicable decisions of the Supreme and particularly in conflict with the decision in McElroy v. U. S., 164 U. S. 76; 41 L. Ed. 355.

2. In holding that a mere instruction of the trial court to the jury to disregard certain inflammatory remarks made by the United States District Attorney in the presence and hearing of the jury, cured whatever error might have been committed, the United States Circuit Court of Appeals for the Fifth Circuit decided a question in conflict with the well settled rulings announced by this Court.

3. In holding that the liberal construction of the jury's verdict meant that Mrs. Phil Chadwick was found guilty on Count 42 of the indictment, upon which she was sentenced to serve two years in the United States Reformatory at Alderson, West Virginia, the United States Circuit Court of Appeals reversed the presumption of innocence that necessarily attaches in the trial of a criminal case.

III.

STATEMENT OF THE CASE

Before the arraignment of your petitioners in the Trial Court below, they and each of them filed their general demurrer and motion to quash the indictment on the ground that there was a fatal misjoinder of persons and offenses; this being overruled they then filed petition for severance and separate trials; this being overruled they filed their motion requiring the United States District Attorney to elect upon which count or counts he would prosecute each of them, which said petition was also overruled by the Court.

It will be noted in each of these motions that these petitioners set out in detail the counts upon which the Government would be able to offer no substantial proof to connect them with the particular offenses alleged (Tr. 63 to 66).

Petitioner Mrs. Phil Chadwick, in her Assignment of Error Number 39 (Tr. 979) urged to the United States

Circuit Court of Appeals that she was not found guilty on the count upon which she was sentenced to serve two years in Alderson, West Virginia, but the Circuit Court of Appeals in its opinion held that the liberal construction of the jury's verdict was that she was found guilty upon said Count 42.

MISJOINDER

The only substantial evidence offered by the Government to connect all of these petitioners with the transactions alleged in the various counts of the indictment was that the narcotics at issue come from a common source. They attempted to establish a conspiracy, connecting all the petitioners with the transactions alleged in the indictment by showing that they purchased these narcotics for resale from a common source, and this Court has always held that a buyer and seller of narcotics cannot be guilty of conspiracy.

IV.

SPECIFICATIONS OF ERROR

PROPOSITION 1.

Where an indictment, containing 42 counts, naming 29 defendants living in various parts of the United States, alleging that some of the offenses were committed in one state, and some in another, it is not within the sound discretion of the Court to refuse to

order the United States District Attorney to furnish the defendants a bill of particulars as to just what each of their connections were with the substantive offenses alleged, although the indictment contained one count of a general conspiracy. (Assignment of errors No. 1.)

PROPOSITION 2.

Although when there are several charges against any person for the same act or transaction, or for two or more acts or transactions connected together, or for two or more acts or transactions of the same class of crimes or offenses which may be properly joined, instead of having several indictments, the whole may be joined in one indictment in separate counts, yet 29 defendants, operating in several separate and distinct parts of the United States, committing different crimes, separate and distinct, complete in themselves, in no way connected with offenses committed by the others, some of which were committed by some of the defendants at one time, and others of which were committed by others of the defendants at other and different times, cannot be joined in the same indictment. (Assignments of errors Nos. 2, 3, 4, 6, 7, 8, 14, 16, 17, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 30, 31, and 32.)

PROPOSITION 3.

Where a defendant is on trial for a crime, and does not take the stand in his own behalf, or for another, and does not, by testimony offered, place his reputation in issue, it is prejudicial error to either offer testimony as to the bad character or reputation of that defendant, or for the prosecuting attorney, in the presence of the jury, charge that defendant with a bad reputation, or to refer to the fact of his incarceration in prison. (Assignments of error Nos. 11, 12, and 18.)

PROPOSITION 4.

Where a defendant has been indicted and is on trial for a certain crime, it is prejudicial error for the Government to offer proof tending to show that he is probably guilty of other, separate, distinct, and extraneous crimes. (Assignments of errors Nos. 13, and 15.)

PROPOSITION 5.

Where testimony is offered, or remarks made in the presence and hearing of the jury by the prosecuting attorney, of such inflammatory nature as would be calculated to inflame the minds of the jury, created resentment, or unduly prejudice the minds of such jury against defendants on trial, it is such prejudicial error that might not likely be erased from the minds of the jury by the instructions of the Court to disregard same. (Assignments of error Nos. 13, 15, 29, 34 and 35.)

PROPOSITION 6.

Where several defendants are on trial for a crime, and do not take the witness stand in their own behalf, it is error for the Court, without request of the defendants, to charge the jury on such failure of defendants to testify, because it unduly emphasizes such fact, and is calculated to lead the jury to believe such defendants are guilty because they did not deny their guilt as witnesses. (Assignment of error No. 9.)

PROPOSITION 7.

While appellants conceded that where a conspiracy has been charged in an indictment against several defendants and it has been proved by the evidence beyond a reasonable doubt, the acts and transactions of one so charged, in furtherance of this conspiracy, becomes the acts and transactions of the others, yet it is error for the Court to fail and refuse to charge that such acts or transactions by one conspirator cannot become the acts or transactions of the others unless and until the jury finds and believes, from the evidence, beyond a reasonable doubt that such others were members of the same conspiracy, as the declarator or actor, and that such acts or transactions were in furtherance of the object of the conspiracy. (Assignment of error No. 36.)

PROPOSITION 8.

Where several defendants are on trial for a crime, under an indictment charging one count of general conspiracy, and 41 substantive offenses, and it develops upon the trial of this case that there was a fatal misjoinder of persons and offenses, and that the proof did not sustain the indictment as alleged, it was error for the Court to fail and refuse to instruct a verdict of not guilty. (Assignment of Error same as under Proposition No. 2, and Assignment of Error No. 37.)

PROPOSITION 9.

Where a verdict of the jury is returned into Court upon an indictment containing several counts, and that verdict is so vague, indefinite, incomplete that it does not dispose if such issues in the indictment, upon which a plea of former jeopardy may be predicated, it is fatal error for the Court to fail and refuse to sustain appellants' motion in arrest of judgment. (Assignments of Error Nos. 2, 3, 4, 6, 7, 8, and 38.)

PROPOSITION 10.

A Sentence of the Court cannot be based on a count of an indictment where the jury's verdict does not specifically include such count in its finding of guilt. (Assignment of Error No. 39.)

PROPOSITION 11.

Where a certain letter alleged to have been written by a defendant on trial for a crime, and containing certain admissions tending to establish his guilt, is admitted into evidence, it is prejudicial error to allow the United States District Attorney to display before the jury genuine specimen of that defendant's handwriting, enlarged to the proportion of six to one for the use of a handwriting expert, as tending to overly emphasize the importance of the letter. (Assignment of Error No. 33.)

V.

BRIEF OF THE ARGUMENT

Under Proposition Number One

The appellants recognize that it is fairly well settled that the failure of the Court to order the United States District Attorney to furnish a bill of particulars is, as a general rule, within the sound discretion of the trial court, but in the instant case, these appellants feel that where the indictment of 42 counts, charging each and every one of 29 defendants with the commission of each and every offense alleged in the indictment, and it appearing that some of these defendants lived in New Orleans, some in New York, others in Chicago, Dallas, and Ft. Worth, many of them not having been acquainted with each other, it was impossible for each of the defendants to be responsible

for, or know, what the others were doing, and what offenses tehy were committing. Without th einformation sought by them, they were confounded in their defense, were unable to prepare to meet the proof offered by the Government, and were so prejudiced in the preparation and presentation of their defense to such an extent that the failure to order the United States District Attorney to furnish said bill of particulars was not within the sound discretion of the Court.

Under Propositions Number Two and Eight

These appellants recognize that where there are several charges against several persons for the same act or transaction, or for two or more acts or transactions of the same class of crimes or offenses, which may be *properly joined*, instead of having several indictments, the whole may be joined in one indictment in separate counts, but there is no authority to join 29 defendants in one indictment, who, if guilty at all, were guilty of the commission of separate and distinct offenses, not connected together, independent, complete in themselves, not provable by the same set of facts or circumstances, some of which were committed by some of the defendants at one time, and others of which were committed by others of the defendants at other and different times, and to do so confounds them, and each of them, in their defense, brands them, and each of them, as habitual criminals in the eyes of the jury, and high-

ly prejudicial to the rights of such defendants so joined together, as was done in this case.

That the appellants, Phil Chadwick and Mrs. Phil Chadwick, on the 28th day of June, 1940, and before they entered their pleas to the indictment, filed their general demurrer and motion to quash the indictment returned herein, on the ground that there was a fatal misjoiner of persons and offenses in said indictment, and at the time this case was called for trial, the Court appointed Howard Dailey, who was representing Phil Chadwick and Mrs. Phil Chadwick, to represent Abe Chapman, Charles Schiffman, and Tommy Cooper, who were brought from the penitentiary for this trial, and who were not represented by counsel, and did not have money with which to hire one. The Court allowed the defendants, Cooper, Chapman, and Schiffman to adopt and avail themselves of any and all motions filed by Mr. and Mrs. Phil Chadwick.

The appellants, Phil Chadwick and Mrs. Phil Chadwick, alleged in their general demurrer and motion to quash that the Government would be able to offer no substantial proof tending to connect them with Counts 1, 2, 3, 4, 5, 6, 7, 8, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 38, 39, 40, 41, or 42 of said indictment. (Tr. p. 65). This general demurrer and motion to quash was by the Court overruled.

That they also duly and seasonably filed their petition for severance, alleging that they were so misjoined, and that the Government would be able to offer no substantial proof tending to connect them with the counts above enumerated, which was also overruled by the Court. (T. p. 64).

That after the Court had overruled their said general demurrer and motion to quash, and petition for severance, they duly and seasonably filed their petition for an order requiring the United States District Attorney to elect upon which count or counts he would prosecute these appellants, setting out that the Government would be able to offer no substantial proof tending to connect them without the commission of the offenses alleged in the counts above enumerated, which was also overruled by the Court. (Tr. p. 72).

Each of these motions were renewed after the Government had closed its case, and before the appellants were called on to offer their defense, and each of said motions were renewed when both sides had closed.

The appellants, at the close of the Government's case, which was renewed after both sides had closed, duly and seasonably moved for an instructed verdict of not guilty, on the grounds that it appeared from the testimony that there was a fatal misjoinder of persons and offenses; that if any conspiracy had been shown at all, that the testimony developed that there was at least four separate and distinct smaller conspiracies,

not connected together, and there was a fatal variance between the allegations in the indictment and the proof adduced from the witness stand, which was prejudicial to the rights of the appellants, branded them as habitual criminals, and was calculated to create in the minds of the jury that they were professional criminals, engage in a nation-wide ring of violators of the Harrison Anti Narcotic Act, and so prejudiced and inflamed the minds of the jury against them as to prevent them from receiving a fair and impartial trial and consideration from the jury.

These appellants then sought, to protect their rights, to be tried independently for the offenses of which the Government might offer proof tending to connect them with, by moving the Court to limit the testimony of the various witnesses to the defendants actually involved in the commission of the various offenses, as will more fully appear in the appellants' assignment of errors Nos. 14, 16, 17, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 30, 31 and 32.

Dewey Ross, one of the defendants, testified, (Tr. pp. 195-200), that he went to Richmond, Texas, to contact Bessie Blakeley and Bubba Blakely, to sell them some narcotics; that he went to New York after narcotics, and that he sold the Blakeleys some of these narcotics at different times, and that none of the other defendants, in so far as he knew, knew anything about this transaction, and that they were transactions purely between him and the Blakeleys, with which none of the

other appellants had any connection, to which these appellants objected, and moved the Court to limit to the defendants, Dewey Ross and Marie Ross, which was overruled by the Court, and an exception taken by the appellants. (Assignment of Errors Nos. 14, 16, and 17.)

That William E. Frey, a Government witness, testified that in Chicago, Illinois, on April 16th, 1939, he arrested Jacob Roamer, and seized 20 ounces of heroin; that at the time of this trial, Jacob Roamer was serving a sentence in the United States Penitentiary at Leavenworth, Kansas, for having committed this offense. These appellants objected to this testimony, and moved that it be limited to the defendant, Roamer, that it was a separate and distinct transaction, in no way connected with the case on trial, and was inadmissible in all purposes, which the Court overruled, and to which the defendants excepted. (Assignment of Error No. 19.)

George Belcove, a Government agent and witness, testified that on June 5, 1939, in Chicago, Illinois, George Taylor was instrumental in the sale and delivery of 4 ounces of heroin to one Emmett Gentry, an informer working under witness' direction; that the said George Taylor was convicted for this offense, and was, at the time of this trial, serving a sentence therefor in the United States Penitentiary at Leavenworth, Kansas, to which said testimony the appellants objected for the reason that it was, as to all of them, a separate

and distinct transaction, in no way connected with the case on trial, and as to the said George Taylor, amounted to putting him twice in jeopardy for the same offense. (Assignment of Errors Nos. 20 and 21.)

D. E. Robertson, a witness for the Government, testified that on February 27th, 1939, he arrested Beulah Franks, and found in her possession a few grains of morphine, to which said testimony these appellants duly objected for the reason that it was out of the presence and hearing of the appellants, a separate and distinct offense, in no way connected with the case on trial, which the Court overruled and the appellants duly excepted. (Assignment of Error No. 22.)

The said D. E. Robertson further testified that on various occasions Beulah Franks turned over to him certain quantities of narcotics; it being shown that Dewey Ross, one of the defendants, made these sales to said Beulah Franks; that Dewey Ross testified that they were independent transactions between him and Beulah Franks; that he was indicted in a separate indictment for these offenses; that none of the other defendants knew of, or had any connection with, such transactions, to which testimony defendants objected, and moved the Court to limit same to the defendant, Dewey Ross, for the reason that they were separate and distrinct transactions, in no way connected with the case on trial, as to any of the defendants except Ross, which the Court overruled and the defendants excepted. (Assignment of Errors Nos. 23 and 24.)

The Government witnesses George Hood, V. C. McCullough, Joseph H. Bell, and Moore, testified that in Dallas, Texas, about July 22nd, 1939, the defendants Cliff Green and his wife, Lavert Green, sold certain narcotics to the said George Hood; that the said Cliff Green and Lavert Green had theretofore been convicted for these sales; that Lavert Green was dead, and that Cliff Green, at the time of this trial, was serving a 3 year sentence in the United States Hospital at Ft. Worth, Texas, for this same offense. These appellants objected to this testimony for the reason that it was a separate and distinct transaction between Green and Hood, and in no way connected with the case on trial, which the Court overruled and these appellants excepted. (Assignment of Errors Nos. 25, 26, 27, and 28.)

Neal C. Windberry, a Government witness, testified that he arrested Tommy Cooper in Brooklyn, New York, and seized certain narcotics and documents from Cooper, more fully set out in Government exhibits Nos. 43, 44, 45, 46, and 47, being, among other things, a book containing the names of these appellants, together with many known and notorious criminals, to which these appellants objected for the reason that such documents and books were highly prejudicial, calculated to inflame the minds of the jury against these appellants; that it was purely hear-say to them, that it was not shown that they knew of such book, was acts and transactions of other and different persons,

out of the presence and hearing of the appellants, and beyond their control, not binding on them, which objection the Court overruled, and the appellants excepted. (Assignment of Error No. 30).

The Government witnesses, John Catana and Raymond A. Richards, testified that in March, 1938, in New Orleans, Louisiana, the appellant, Abe Chapman, sold and delivered to one Alvarez, at John Catana's house, 45 ounces of heroin; that theretofore, the appellant, Chapman, had been convicted for this offense in the United States District Court, at New Orleans, and at the time of the trial of this case, was serving a sentence for this violation in the United States Penitentiary at Leavenworth, Kansas, to which said testimony these appellants objected for the reason that as to Abe Chapman it amounted to putting him twice in jeopardy for the same offense, and as to the other appellants, it was a separate and distinct transaction, independent in itself, and in no way connected with the case on trial, which said objection the Court overruled, and the defendants then and there excepted. (Assignment of Errors Nos. 31 and 32.)

These appellants respectfully urge that the commission of the separate offenses above set out clearly show that there was a misjoinder in this case, and that they were calculated to, and inevitably did, prejudice the minds of the jury against them; that these offenses were separate and distinct, complete in themselves, some of which were committed by some of the defend-

ants at onetime, and others of which were committed by others of the defendants at other and different times, and the evidence of which prejudiced the rights of these defendants, branded them as habitual criminals, confounded them in their defense, and so inflamed and prejudiced the minds of the jury in such a way as it was calculated to and did, so prejudice the minds of the jury against them, as to prevent them from receiving that fair and impartial consideration from the jury to which they were entitled.

AUTHORITIES

McElroy v. U. S., 164 U. S. 76, 41 L. Ed. 355;

Coco v. U. S., 189 Fed. 289 Fed. 33;

Wyatt, et al v. U. S., 23 F. (2) 791; 227 U. S. 588; 72 L. Ed. 1002;

L'Rosa, et al v. U. S., 15 Fed. (2) 749;

Edenfield, 8 Fed. (2) 614(reversed), 273 U. S. 660; 71 L. Ed. 827;

De' Luca v. U. S., 298 Fed. 412;

Vaccaro v. U. S., 30 Fed. (2) 678.

Under Propositions Nos. Three, Four, and Five

We think that Propositions 3, 4, and 5 are so closely related that they might be treated together. Aaron Goldberg, a Government witness, testified that in 1937,

he was serving a term in the United States Penitentiary Annex, at Leavenworth, Kansas, for a violation of the Harrison Anti Narcotic Act, and while there met the defendants Charles Schiffman and Abe Chapman, to which testimony the appellants objected and moved the Court for a mistrial, for the reason that these defendants had not taken the stand, had not put their reputations in issue, and this testimony was of such prejudicial and inflammatory nature that its harmful effect could not be cured by the mere instruction of the Court to the jury that they must not consider that these defendants were in the penietntiary, but just merely to consider that the witness met these defendants at Leavenworth, Kansas, which motion for a mistrial the Court overruled, and the appellants then and there excepted, (Tr. p. 107); Dewey Ross testified that he was indicted in the United States District Court for the Northern District of Texas, at Ft. Worth, for a prior offense of violating the Harrison Anti Narcotic Act; that the day before his trial was to come up, Chadwick told him that he would get 15 years, and his wife would get 5 years; that he was not telling him what to do, but that it was a mighty big world; that he and his wife, Marie, failed to show for their trial, forfeited their bonds, and went to Phil Chadwick's house, where they were harbored by Chadwick for some several months. In this connection, it was admitted that an indictment at this time was pending against Chadwick in this Court for harboring Marie and Dewey

Ross, and appellants say that this testimony was evidence of an extraneous crime, separate and distinct, in no way connected with the case on trial, and was of such prejudicial and inflammatory nature, as was calculated to, and did, prejudice the minds of the jury against Chadwick, and was of such harmful nature that would prevent him from getting fair and impartial consideration from the jury; the appellants objected to this testimony for the reasons set out, and the Court overruled same, to which appellants excepted, (Tr. p. 176-79).

As is more fully set out in appellants' assignment of error No. 18, the Government witness Glenn Cox testified that he had seen Abe Chapman while he was serving a sentence in the United States Penitentiary at Leavenworth, Kansas, in 1935 and 1936, (Tr. p. 289-90); that as set out in appellants' assignment of error No. 15, Dewey Ross testified that he had taken 25 ounces of heroin back to Phil Chadwick, from whom he had theretofore purchased it, for the reason that he had used some of this narcotics, that it had been cut with poisonous chemicals, and had caused sores to break out on the witness, Ross, (Tr. p. .....), and more fully appearing in appellants' assignment of error No. 15, to all of which testimony appellants objected for the reason that it was prejudicial, inflammatory, and of such harmful nature as would cause the jury to believe that Chadwick was a murderer, dealing in poisonous drugs, and calculated to so inflame

the minds of the jury against Chadwick, as to prevent them from giving him a fair and impartial trial, which said objection the Court overruled, and the appellants excepted.

That Joseph H. Bell, a Government witness, and agent, testified (Tr. pp. 614-15) that Cliff Green told him, "I give you all the lead you wanted; I told you everything; but I am not going to tell you any more, because I have to live; I am not going to testify against them (the defendants on trial) because if I do, they will kill me." The appellants objected to this testimony for the reason that it was prejudicial, inflammatory, and calculated to lead the jury to believe that the appellants were killers and murderers, moved the Court for a mistrial, and for the further reason that this testimony was of such prejudicial and inflammatory nature as would inevitably prevent the jury from giving these defendants a fair and impartial trial, which the Court overruled and the appellants excepted.

In his closing remarks to the jury, the Honorable Clyde O. Eastus, United States District Attorney for the Northern District of Texas, stated to, and in the presence and hearing of, the said jury:

> "I am not going to discuss much in this case except the defendant, Shaffer, for the reason that there has been no evidence to refute the Government's case against any other defendant in this case, with the exception of Schaffer. Have you heard any witness on the stand testify to anything refuting any evidence that the United States Gov-

ernment put on the witness stand, outside of the evidence of the defendant, B. H. Schaffer? Not a particle. I will not waste any time on them. *Nobody* has denied what the Government has offered." (Tr. p. 956)

The appellants objected and excepted to these remarks, and moved the Court for a mistrial for the reason that none of the defendants, except Schaffer had taken the stand, and the remarks of the United States Attorney was directly referring to their failure so to do, and was of such inflammatory and prejudicial nature as was calculated to prevent the jury from giving these defendants a fair and impartial trial.

Further, in his closing remarks to the jury, the Honorable Clyde O. Eastus, United States District Attorney, stated to, and in the presence and hearing of, the said jury, the following:

"If you want to find out what is going on in the inside, you have got to go on the inside and bring somebody out, as we have done here. I would not ask you to convict these defendants on the testimony of Glen Cox and Dewey Ross, unless they were corroborated, and let us see whether they are. Does *anybody* deny Dewey Ross and his wife lived at Phil Chadwick's house? Did Dewey Ross go register at the Plymouth Hotel? He certainly did. The record is in this court here. Is that corroboration? Can you believe them? Is he telling the truth?

"Leftak and Schiffman's records are here. Is there any dispute about that? Can you believe Glen Cox? Of course you can. Let me tell you

> something else. My experience has been that when any witness testifies against a Government agent he is telling the truth. You talk about they have got him here under guard—yes. he is here under guard, so that some of you fellows won't kill him before he testifies."

Government counsel seek to justify Mr. Eastus' remarks as being in answer to an argument by Mr. Mack Taylor, counsel for B. H. Schaffer, wherein Mr. Taylor stated to the jury that the Government had Dewey Ross, Mrs. Dewey Ross, and Glenn Cox under guard to keep them from taking dope. In this connection, these appellants wish to call this Honorable Court's attention to the fact that Taylor represented no one with the exception of Schaffer, and Mr. Eastus' statement was made in a sweeping gesture toward all the defendants that , "we have them under guard to keep you fellows from killing them." He did not say that they were under guard to keep Schaffer from killing them, but he referred directly to all the defendants. Certainly counsel representing other of the defendants could not be bound by anything that Mr. Taylor said. In addition to this, the defendants and Government witnesses, Ross, Mrs. Ross, and Cox, were confined in the Government Hospital at Ft. Worth, Texas, had not made bond after the indictment was returned, and were brought to and from the Courtroom by guards from the Government Hospital. This fact was well known to Mr. Eastus, and he knew that they were under guard for no other purpose.

The Court allowed us a full bill, including the right to show that these defendants and witnesses had not made bail, that they were confined in the Government Hospital and that they were brought to and from this hospital by the Hospital Guards, who guarded them in the Courtroom, as they would any other defendant, not having been admitted to bail, which the Government admits to be true. To which said argument the appellants then and there excepted and objected, and moved the Court for a mistrial for the reason that this argument was prejudicial and of such highly inflammatory nature as to lead the jury to believe that they were trying a bunch of killers and murderers, and its ill effect could not be cured by instruction of the Court to disregard it, which said motion the Court overruled, and the appellants excepted. (Assignment of Errors Nos. 11, 12, 13, 15, 18, 29, 34, and 35.)

We are discussing assignments 11, 12 and 13 together as we believe that the same issues are substantially involved therein. It is here pointed out that perhaps the most damaging statement made with reference to assignment No. 13 was the fact that Philip Chadwick had been indicted in another court when such was entirely collateral to the issue which was being tried.

As to assignments Nos. 11 and 12, the statements made by Goldberg that he saw Schiffman and Chapman at Leavenworth are also in our opinion reversible error as the judge should have granted a mistrial.

Perhaps the clearest exposition of the rationale behind the line of cases upholding our point of view can be found in Boyd vs. U. S., 142 U. S. 450, where the Supreme Court stated:

> "Proof of them only tended to prejudice the defendant with the jurors to try to draw their minds away from the real issue and to produce the impression that they were wretches whose lives were of no value to the community and who were not entitled to the full benefit of the rules prescribed by law, for the trial of human beings charged with crimes involving the punishment of death. Upon a careful scrutiny of the record, we are constrained to hold that in at least the particulars to which we have averted, these rules were not observed at the trial below. *However depraved in character and however full of crimes their past lives may have been, the defendants were entitled to be tried upon competent evidence and only for the offense charged.*" (Italics ours).

Another case whose language is of great interest is that of Mercer vs. U. S., 14 Fed. (2d) 281, where the court states at page 283:

> "But not having testified and not having put in issue his reputation of good character or his credibility, the general rule of law is that evidence assailing his character or showing previous conviction is not admissible."

See also:

Thompson vs.U. S., 283 Fed. 895;

Guilbeau vs. U. S., 288 Fed. 311;

Newman vs. U. S., 289 Fed. 712;

Jianoli vs. U. S., 299 Fed. 496.

We also wish to call your attention to the case of U. S. vs. Dressler, 112 Fed. (2d) 972, and the language quoted by the court at page 981.

See also:

Fish vs. U. S., 215 Fed. 544;

Paquin vs. U. S., 251 Fed. 577;

Manuel vs. U. S., 254 Fed. 272.

Assignment of Error No. 34 involves a statement by the prosecutor in relation to the failure of the defendants to testify. In considering the same, please scrutinize cases cited as to assignments 11, 12 and 13, for in reality the same point is applicable. However, more specifically under this point we wish to call the Court's attention to the case of Wilson vs. U. S., 149 U. S. 60, in which the Supreme Court reverses a decision of the trial court wherein the prosecuting attorney made a statement with reference to the defendant's failure to testify on his own behalf.

Perhaps the most important point to be raised in relation to Assignment of Error No. 35 is a statement by the prosecuting attorney to the effect, "Yes, he is here under guard so some of you fellows can't kill him before he testifies." This statement is not only vicious, but prejudicial as it is extremely inflammatory and not

based on any evidence adduced at the trial. For cases in which the Appellate Courts have reversed the lower courts because of such statements made by the prosecutor, see:

Williams vs. U. S., 168 U. S. 382;

Allen vs. U. S., 115 Fed. 4;

Lan vs. U. S., 13 Fed. (2d) 975;

Rossi vs. U. S., 9 Fed. (2d) 363.

In regard to the other statements made herein to the effect that Schiffman and Leftak had records without them even taking the stand and putting their character in question, the cases cited under assignment Nos. 11, 12 and 13 would also be applicable herein.

We also wish to call the Court's attention to a very recent case. U. S. vs. Minuse, 114 Fed. (2d) 36. In that case the Circuit Court of Appeals, Second Circuit, reversed a conviction of the defendants on the grounds that the prosecutor asked a government witness whether he had embezzled money from a bank which he subsequently used in a concern operated by defendants. The court stated that it was obvious that the only reason the question was asked was to show that the defendants associated with embezzlers and such a question was unconscionable.

See also:

U. S. vs. Sprengel, 103 F. (2d) 876;

Fitter vs. U. S., 258 F. 567, 573;

Berger vs. U. S., 295 U. S. 78, 89.

Under Proposition Number Six

Neither of the appellants took the witness stand in his own behalf. But, without request from them, and over their objections, the Court charged the jury that the appellants had the right to take the witness stand if they chose, and that they had a right not to testify. But, if they did not testify, this fact should not be considered a circumstance against them, and that such failure to testify on the part of the defendant should not be discussed by the jury during their deliberation; to which said portion of the Court's charge, the appellants objected and excepted for the reason that it overly emphasized such failure, that it was calculated to lead the jury to believe that they were guilty, unable to stand cross-examination, and that such failure would, in effect, be tantamount to their admission of guilt. (Tr. pp. 974-77).

Assignment of Error No. 9 relating to the failure of the defendants to take the stand in their own defense is of particular importance and we believe one of the principal grounds upon which a reversal must be had.

This charge of the Court was contrary to the provisions contained in the Fifth Amendment and also in 28 U. S. Code, Section 632. Perhaps the most im-

portant decision in this respect can be found in the case of Bruno vs. U. S., 308 U. S. 287, a very recent declaration by the Supreme Court reversing a decision of the trial court and on practically the identical issue raised herein. For other pertinent cases see:

U. S. vs. Brookmar, 1 Fed. (2d) 528;

McKnight vs. U. S., 115 Fed. 972;

Stout vs. U. S., 227 Fed. 779;

Michael vs. U. S., Fed. 7 (2d) 865;

Hersh vs. U. S., 68 Fed. (2d) 799;

Gold vs. U. S., 102 Fed. (2d) 350, 352;

Sporf vs. U. S., 156 U. S. 51.

We would like to point out that the language in the BRUNO case, supra, is of extreme interest and Mr. Justice Frankfurter in his discussion of the psychological aspect of this situation quotes language which we believe to be very worth-while and impressive. We are referring more specifically to the last paragraph of the said decision:

Under Proposition Number Seven

In his charge, the Court instructed the jury, in effect, that where two or more persons are guilty of a conspiracy, the acts and transactions of each of the conspirators becomes the acts and transactions of all members of the conspiracy, and the appellants objected and

excepted to this portion of the Court's charge, for the reason that the Court did not charge the jury that such conspiracy must first have been established by competent evidence beyond a reasonable doubt, and that such transaction or act of conspirator were in furtherance of the conspiracy, as alleged, before such acts or transactions of one of the conspirators could become the acts and transactions of others charged, which said objections and exceptions the Court overruled, and the appellants then and there excepted. (Tr. p. .....). (Assignment of Error No. 36.)

This assignment deals with the failure of the court to charge that they must find first that a conspiracy actually existed before charging that the declaration of a co-conspirator is binding on all the other members of said conspiracy. We think it is the rule of evidence that in a conspiracy before testimony of a co-conspirator is admissible, the existence of a conspiracy must be shown. As a consequence, it would logically follow that the charge requested should have been given you.

See:

Pope vs. U. S., 289 Fed. 312;

Staeger vs. U. S., 233 Fed. 510;

U. S. vs. Freedman, 268 Fed. 655;

Langer vs. U. S., 76 Fed. (2d) 817;

Tingle vs. U. S., 38 Fed. (2d) 573;

Dahly vs. U. S., 50 Fed. (2d) 37;

U. S. vs. Falcone, 109 Fed. (2d) 579.

Under Propositions Numbers Nine and Ten

We wish to call the Court's attention to the verdict of the jury as detailed in appellant's statement of the nature of the case, in the beginning of this brief. It can readily be seen that the verdict is so vague and indefinite as to be unintelligible. We doubt that a plea in former jeopardy could successfully be urged and maintained upon many offenses alleged in the indictment, for instance—the verdict as to Charles Schiffman was, "We further find the defendant, Charles Schiffman, guilty in counts 1 to 6, inclusive, and count 42," not disposing of counts 7 to 41, inclusive, as to Schiffman.

The verdict as to Abe Chapman is that, "We further find the defendant, Abe Chapman, not guilty as charged in counts 11 to 41, inclusive. We further find the defendant, Abe Chapman, guilty in counts 1 to 6, inclusive, and count 42," and not disposing of counts 7 to 11.

The verdict as to Phil Chadwick is, "We further find the defendant, Phil Chadwick, not guilty as charged in counts 1 to 6, inclusive. We further find the defendant, Phil Chadwick, guilty in Counts 7 to 42," which said verdict, in our opinion, would not include 42, which was the conspiracy count.

The verdict as to Mrs. Phil Chadwick is, "We further find the defendant, Mrs. Phil Chadwick, not guilty as charged in counts 1 to 6, inclusive. We further find the defendant, Mrs. Phil Chadwick, guilty in counts 7 to 42," which said verdict stated, "7 to 42," and does not use the word "inclusive". It is our contention that Mrs. Chadwick was not found guilty on count 42. In this connection, we wish to call the Court's attention to the sentence imposed on Mrs. Phil Chadwick, (Tr. p. .....), wherein, she is sentenced to "two (2) years on count 42, and for 5 years generally on counts 7 to 41, inclusive.

"It is further ordered that execution of said sentence on counts 7 to 41, inclusive, be, and is hereby, suspended, and the defendant be placed on probation for five (5) years after execution of sentence on count 42."

We respectfully submit Mrs. Phil Chadwick was not found guilty as to count 42, and, therefore, so much of her sentence as directs that she be confined in the United States Reformatory at Alderson, West Virginia, for a period of two years, must fall, and her plea in abatement especially should have been suspended.

AUTHORITIES

Dealey vs. U. S., 152 U. S. 439; 41 S. Ct. 680; 38 L. Ed. 545;

Jolly vs. U. S., 170 U. S. 402; 42 L. Ed. 1085;

Sylvester vs. U. S., 112 U. S. 216; 5 S. Ct. 118; 28 L. Ed. 697.

Under Proposition Number Eleven

In connection with this proposition, appellants wish to call the Court's attention to assignment of error No. 33. The letter in question had been admitted over the objection of the appellants, for the reason that there was, at the time the letter was brought into this court, an action pending in the District Court in and for the Southern District of New York, to suppress this letter, which said Court had not passed upon the issue of its suppression, and which action had been brought on the ground that it had been seized as a result of an illegal search, and there was no order obtained from that Court to remove it to the United States District Court for the Northern District of Texas, to be used in evidence.

In the second place, appellants contend that it was error for the Court, over their objections, to make enlarged reproductions of this letter, and of admitting specimens of appellant's, Chadwick's, handwriting, and display it before the jury, as tending to overly emphasize its importance, and was of such harmful nature as to unduly prejudice the minds of the jury, and to lead them to believe that if the letter was in truth and in fact one written by Chadwick, that his conviction should be certain.

Therefore the introduction of the letter in evidence in spite of the fact that a motion was pending in another district to suppress the said letter, must be considered extremely prejudicial to the rights of the defendants. It must not be forgotten that the said motion was pending in a court of coordinate and equal jurisdiction to that where the trial of the instant matter was being conducted, and that no decision had been rendered by the District Court in and for the Southern District of New York, as to the validity of the said motion. As a consequence, the district court in Texas had no right to admit the said letter in evidence until a final determination of the efficacy of Schiffman's contention had been passed upon.

AUTHORITIES

Silverthorne vs. U. S., 251 U. S. 385;

Boyd vs. U. S., 116 U. S. 616;

Weeks vs. U. S., 237 U. S. 383;

Agnello vs. U. S., 269 U. S. 20;

Go-Bart vs. U. S., 282 U. S. 344.

It cannot be said that the errors complained of did not affect a substantial right of these appellants. Clifton Green had been convicted in the United States District Court for the Northern District of Texas at Dallas along with his wife for selling narcotics to George Hood, for which the United States Attorneys then

thought separate and distinct transactions of him and his wife, and while his wife, LaVert Green, had received a suspended sentence and had thereafter died, Clifton Green was, at the very time of his trial, serving the sentence imposed upon him for this separate and distinct transaction. While these transactions were not set out as substantive offenses, they were alleged as overt acts of the conspiracy, all the testimony used in his former conviction was brought out and paraded before the jury, and, in addition to that, Joseph H. Bell testified that Green had told him that he would tell everything, but would not testify because he was afraid these appellants would kill him. Think of it! The Court attempted to limit the testimony as to Green only, and Green is not appealing, but how could a jury of laymen fail to be prejudiced against a bunch of men whom they thought to be killers? Besides all this, if this Court pleases, Bell's conversation with Green was after he had been convicted and his part of the conspiracy, if any, was presumed to have ceased.

Schiffman and Liss, alias Cooper, had been convicted in New York for their part in the alleged conspiracy on what the authorities then deemed to have been a separate and distinct transaction, yet all the testimony, exhibits, and narcotics used in their trials there were used in this trial. They were brought from the penitentiary to be tried along with these appellants, and not one line of testimony was introduced to show that any of the other appellants participated in these

transactions. The Court also attempted to limit this testimony as to the count of conspiracy against them alone, but the jury got the full benefits of it as to the other appellants.

Chapman had been convicted in the United States District Court at New Orleans. George Taylor, Arthur C. Roberts, and Jacob Roamer had been convicted in Chicago, all for violating the Harrison Anti Narcotic Act, and were serving their sentences for these violations in the United States Penitentiary at Leavenworth, Kansas, yet the very same testimony, narcotics, and other exhibits theretofore used in their convictions were introduced and paraded before the jury in this trial. If these were not separate and distinct transactions, complete in themselves, some of which were committed by some of the defendants at one time and others of which were committed by others of the defendants at other and different times, then there can be none. If this is allowed, then we might as well have only one indictment at each term of court, where all the defendants charged might be joined in that one indictment, and have only one trial for each term of court. This procedure would not be enlarging much on what was had in this case. Imagine a jury of laymen intelligently and properly limiting testimony to the various ones of twenty-nine defendants, charged in an indictment of forty-two counts of substantive offenses, and ninety-two overt acts committed in furtherance of a conspiracy, and covering transactions in New

York, Chicago, Houston, Fort Worth, Dallas, Jacksboro, and Richmond, over a period of three years!

In McElroy vs. United States, supra, which we think clearly applicable to this case, the Court said:

> "And in our opinion, they were not for two or more transactions of the same class of crimes or offenses which might be properly joined, because they were substantive offenses, separate and distinct, complete in themselves, and independent of each other, committed at different times, and not provable by the same evidence. In cases of felony, the multiplication of distinct charges has been considered so objectionable as tending to confound the accused in his defense, or to prejudice him in his challenges, in the matter of being held out to be habitually criminal, in the distraction of the attention of the jury, or otherwise, that it is the settled rule in England and in many of our states, to confine the indictment to one distinct offense, or restrict the evidence to one transaction.
>
> "It is clear that the statute does not authorize the consolidation of indictments in such a way that some of the defendants may be tried at the same time with other defendants charged with a crime different from that for which all are tried. And even if the defendants are the same in all the indictments consolidated, we do not think the statute authorizes the joinder of distinct felonies, not provable by the same evidence and in no sense resulting from the same series of acts."

Counsel for the Government contend that the Court properly limited the testimony to the various defendants of their various transactions, and that only the

Chadwicks, Chapman, Schiffman, Beland and Barkley are appealing, and that the others accepted sentences imposed upon them, and that these appellants cannot be heard to complain as to the testimony that was limited, or attempted to be limited, to the others, but, as stated in McElroy vs. United States, supra, this position is erroneous, and quoting further from that decision, it is said:

> "It is admitted by the Government that the judgment against Stuffelbeam and Charles Hook (two of the defendants) must be reversed, but it is contended that the judgments as to the other three defendants should be affirmed, because there is nothing in the record to show that they were prejudiced or embarrassed in their defense by the course pursued. But we do not concur in this view. While the general rule is that counts for several felonies of the same general nature, requiring the same mode of trial or punishment, may be joined in the same indictment, subject to the power of the Court to quash the indictment or to compel an election, such joinder cannot be sustained where the parties are not the same and where the offenses are in no wise parts of the same transaction and must depend upon evidence of a different state of facts as to each or some of them. It cannot be said in such case that all the defendants may not have been embarrassed and prejudiced in their defense, or that the attention of the jury may not have been distracted to their injury in passing upon distinct and independent transactions."

The Government contends that each and every one of the defendants were charged with the commission of each and every offense alleged in the indictment; that one count of conspiracy was alleged, and if the defendants were found guilty of the conspiracy count, then it follows that each and every one of them so found guilty of conspiracy, would be equally guilty of all counts in the indictment, whether or not they knew of or had any connection with the actual commission of the offenses. But the evidence does not support this contention. Ross testified (Tr. pp. 207-31) that no one had anything to do with the sales he made to the Blakeleys, to Cox, to Beulah Franks, or to any one else, except him and his wife. He said that when he bought narcotics from any of the other defendants, he paid for it, it became his, and what he did with it from there on, was no concern of any of the other defendants. It is not contended that any of the other defendants participated in the sales by Green to Hood, or sales made by Cox, Roamer, Roberts, Chapman, Schiffman, or by others except the ones actually making the sales, except that some of such narcotics may have been bought by them from others of the defendants at wholesale to be retailed by them, but in each instance they testified when they bought it, it became their own, they paid for it, and what they did with it from the time they purchased it was purely their own business. It is so well settled that a buyer and seller of contraband narcotics are not guilty of a conspiracy, except where

there is an agreement between them that they will purchase exclusively from one seller, or that there might be an agreement as to its disposition, that it would be mere surplusage to quote authorities or argue. There is no evidence of exclusive purchases or agreement as to disposition of the purchases made in this case.

Therefore, the conclusion is inescapable that the indictment contains many separate and distinct offenses, complete in themselves, some of which were committed by some of the defendants at one time, and others of which were committed by others of the defendants at other and different times, as was alleged and pointed out in the appellants' general demurrer and motion to quash, petition for severance, and petition for order directing the United States District Attorney to elect, filed before each arraignment, and renewed at the close of the Government's case, and when each side had closed.

This very situation is fully and ably discussed in Coco v. United States, 289 Fed. 33, from which we quote as follows:

> "We are clear in the opinion that an indictment would be fatally defective if upon its face it charged several defendants for several offenses committed by them independently of each other, some of which were committed by some of the defendants at one time, and some of which were committed by other of the defendants at a different time. Where these facts do not appear upon the face of an indictment, but do appear on the trial from the evidence, the

defendants are as much entitled to the benefit of protection of the rules of law above laid down as if the indictment had fairly stated the facts. However unobjectionable on its face an indictment may be, conviction under it may not lawfully result from proof of the identical facts which would, if distinctly stated in it, vitiate the indictment and enable the defendants, even after conviction, to arrest or reverse any judgment rendered on it against them.

"If two offenders be charged in one indictment which is faultless in form, and it be developed in the evidence that the two defendants committed their several offenses at different times or places —in other words that they are not guilty of one and the same offense—the proof does not sustain the indictment. In the present case, according to the recitals in the Bill of Exceptions each defendant was equally guilty, but they did not participate in one and the same offense. This was not shown until the evidence was given to the jury. At that stage of the trial each defendant was placed in legal jeopardy and was entitled to have a verdict of the jury on the question of his guilt in the absence of some statutory or legal ground, authorizing a nolle prosqui or other withdrawal from the jury, that another indictment might be preferred or continuance granted. The defendant having been placed in jeopardy, and being entitled to a verdict of acquittal on the proof made, cannot be again tried for the same offense."

The doctrine above laid down is also supported and approved by:

Brine v. U. S., 200 Fed. 726;

U. S. v. Dietrich, 126 Fed. 664 (opinion by Mr. Justice Van Deventer, now retired);

United States v. McConnell (D. C. Pa. 1923), 285 F. 164.

It is unbelievable that the defendants' rights were not prejudiced by the testimony of Cox, and Goldberg, that they had met Chapman and Ross while they were serving terms in the United States Penitentiary at Leavenworth, Kansas, for violating certain provisions of the Harrison Anti Narcotic Act. The jury could not help but conclude that they were trying a gang of habitual criminals. Can anyone be credulous enough to believe that Chadwick's rights were not prejudiced by introducing into evidence testimony that he had harbored fugitives from justice, for which an indictment was pending against him, in a separate and distinct case, pending in the very Court in which he was then being tried for his liberty under this indictment?

Who can say that the rights of these appellants were not prejudiced and the minds of the jury so inflamed as to create resentment, which could not possibly be erased from their minds by mere instruction from the Court by the speech of the United States District Attorney, wherein he told them that Schiffman's and Leftak's records were before them, wherein in truth and in fact it was not before them, but leading the jury to believe they were habitual criminals, killers, and incessant law breakers, and where the United

States District Attorney told the jury that he had the Government witnesses, Ross, Mrs. Ross, and Cox, under guard to keep these appellants from killing them before they testified, whereas in truth and in fact, Mr. Eastus knew that they were under guard because they had not made bond after this indictment had been returned against them?

Can it be said that the testimony of Joseph H. Bell that Clifton Green had told him that he could not testify in this case because these appellants would kill him, did not so prejudice and inflame the minds of the jury, and create resentment to such an extent as it would be practically impossible for the jury to give them a fair and impartial consideration upon any issue in the case?

This Court may well take judicial notice that, at best, the average juror in Federal Court has reversed the presumption of innocence. They believe that anything a Government agent testifies to, or that a United States Attorney says, even in the heat of argument, is undeniable law.

The petitioners, and each of them, here and now reurge every assignment of errors heretofore urged in the Court below and insist that in their humble judgment, such errors so assigned and urged were of such harmful nature, and so affected their substantial rights as would necessitate a reversal of this cause; they especially urge further that the errors complained of by

them materially and substantially affected the verdict of the jury returned against them; that, as above set out, they abandon none of the assignments of errors or propositions urged in their original appeal to the United States Circuit Court of Appeals and brief filed thereunder, but earnestly here reurge each and every one of them.

Petitioners especially urge that it was substantial error affecting their substantial rights, to force all of them to go to trial together, and for the trial court to fail and refuse to: (1 overrule their motion to quash and general demurrer to the indictment; (2) to fail and refuse to grant to them, and each of them, petition for severance; and (3) to fail and refuse to order the United States District Attorney to elect upon which count or counts he would go to trial as to each of these petitioners. In this connection, these petitioners respectfully call this Honorable Court's attention to the fact that before they pleaded to this indictment, they filed and urged their general demurrer and motion to quash, (Tr. p. 65); motion for severance, (Tr. p. 64); and their motion to require the United States District Attorney to elect upon which count or counts he would prosecute each of these petitioners, (Tr. p. 66); that each of these petitions and motions were renewed after the Government had rested (Tr. p. 74), (Tr. p. 76), and (Tr. p. 77) respectively, and which said motions were so renewed after both sides had closed.

Petitioners earnestly urge that there was a misjoinder of persons and offenses in this case, in that the offenses as set out in the various counts of the indictment, if committed at all, were committed by some of the petitioners, at one time, and others of the defendants who did not appeal, at one time, while others of said offenses, if committed at all, were committed by others of the defendants at other and different times, in no wise connected together, not part of the same series of acts or transactions, separate and distinct, and in no way connected together so as they might be joined in one indictment.

The record shows that the offenses committed by Abe Chapman were committed by him in New Orleans, Louisiana; that he had theretofore been convicted for those offenses, and was, at the time of the trial, serving his sentence imposed upon him for the same offenses; the record discloses also that Louis Sherman, Charles Schiffman, Moe Liss, Glenn Cox, Clifton Green, George Taylor, Arthur C. Roberts, and Jacob Roamer had theretofore been convicted, and at the time of the trial they were serving the sentences imposed upon them for such conviction, and that Dewey and Marie Ross had theretofore been indicted in a separate and distinct indictment for the offenses joined against them in this indictment, yet all these offenses were joined against all the defendants in this indictment. The record discloses that they had acted separately, distinctly, and apart from each and all of the defendants, and

that such transactions on their part were independent and separate transactions, and in no way connected with the main offenses contained in the indictment.

It is well settled in this jurisdiction that buyer and seller of narcotics cannot be guilty of a conspiracy, for the reason that they are not acting in common, but approach the transaction from different angles, the one to buy, and the other to sell; these petitioners earnestly urge that the only substantial evidence offered to prove, or tend to prove, that there was such connection between them as would permit their being joined in the same indictment, was that the narcotics they had or sold probably came from a common source.

These petitioners earnestly urge that there is a vast difference between this case and the Ginsberg case cited by the United States Circuit Court of Appeals for the Fifth Circuit in this case (96 F. (2d) 433). In that case there was testimony that Ginsberg, the alleged head of the conspiracy, had an agreement with the other defendants that in return for his selling them narcotics at a reduced rate, they would purchase exclusively from him. We concede that under such circumstances, a buyer and seller would be guilty of conspiracy, but there is no such evidence in this case.

Then, too, in that case, the Court held that the appellants did not sufficiently advise the Trial Court prior to their trial, in their general demurrer and motion to quash, in what respect or counts in the indict-

ment they were misjoined. These petitioners are represented by one of the same counsel that representd Ginsbrg, and most of his co-defendants, and, with the experience of the Ginsberg Case at hand, particularly pointed out in their general demurrer and motion to quash in what way they were misjoined, (Tr. 63).

These petitioners urge that it cannot be said that such misjoinder did not affect their substantial rights, in that it did actually confound them in their defense, brand them as habitual criminals, and so confuse the mind of the jury as to make it impossible for the jury to give them a fair and impartial considertion as to their actual participation in the offenses alleged. We say that under McElroy v. United States, 164 U. S. 76, 41 L. Ed. 355, such misjoinder constituted error materially affecting their rights, and that this petition should be granted.

These petitioners say that it was error, substantially affecting their rights for the Court to allow the United States District Attorney to introduce evidence in the trial of the case of these various separate and distinct offenses, as they earnestly urged in their original brief in this case, which they here now adopt and urge in this motion of certiorari.

Petitioners urge that it was such error affecting their substantial rights as the harmful effects thereof could not be removed or erased by instructions of the Court for the United States District Attorney to make

the inflammatory remarks as is more fully set out in the petitioners' assignment of errors number 34 and 35, (Tr. pp. 956, 957.)

It is well settled in this jurisdiction where such remarks of the prosecuting attorney are of such a prejudicial nature as to arouse resentment or hatred in the mind of the jury that its harmful effect might not likely be erased by mere instructions of the Court to disregard same, and that under such circumstances, such remarks would necessitate reversal of the case. These petitioners urge that the remarks of the Honorable Clyde O. Eastus, to the effect that they had killed one of the defendants to keep him from testifying in the case, clearly comes within the scope of this proposition.

In Ruling Case Law, Volume 22, Page 12, the appellants' contentions in this matter are well stated as follows:

> "The prosecuting attorney, in a criminal case, represents the people, and, having no responsibility, except to fairly discharge his duty, should put himself under restraint, and should not, in his remarks before the jury, go beyond the evidence or the bounds of a reasonable moderation. If he lays aside the impartiality that should characterize his official action to become a heated partisan, and by vituperation of the prisoner and appeals to the prejudice seeks to procure a conviction at all hazards, he ceases properly to represent the public interest. (Clutt v. Rosenthal, 100 Mich. 193, 58 N. W. 1009, 43 A.S.R. 446; State vs. Warford, 106

Mo. 55, 16 S. W. 886, 27 A.S.R. 322 and note; People v. Fielding, 158 N. Y. 542, 53 N. E. 497, 70 A.S.R. 495 and note, 46 L.R.A. 641 and note. Note: 65 A.S.R. 349). Thus, it has been held that a District Attorney should not throw the weight of his personal influence into a case which he is conducting as a public officer by announcing his individual opinion that the accused deserved hanging. (State vs. Blackman, 108 La. 121, 32 So. 334, 92 A.S.R. 377 and note). It is the duty of the prosecutor to see that the competent evidence is submitted to the jury; and, above all things, he should guard against anything that would prejudice the minds of the jurors and tend to hinder them from considering only the evidence introduced. He should never seek by any artifice to warp the mind of the jurors by inference and insinuations. (State v. Irwin, 9 Idaho 35, 71 Pac. 608, 60 L.R.A. 716.) And, it is error for the prosecuting attorney in a criminal case to ask questions, which by insinuation and inuendo, tend to reflect on the moral character of the accused, when there is not a scintilla of testimony to justify them. (Bailey v. People, 54 Colo. 337, 130 Pac. 832, 45 L.R.A. (N.S.) 145) * * * If a conviction in a criminal case follows an improper and dangerous appeal to the prejudice of the jurors, made by the prosecuting attorney, and it is reasonably certain that his course brought about such result, the judgment will be reversed for such error whenever it is raised by a proper exception. (People v. Fielding, 158 N. Y. 542, 53 N. E. 497, 70 A.S.R. 495 and note, 46 L.R.A. 641 and note.")

These petitioners concede that where improper remarks of a prosecuting attorney are followed by an instruction of the Court to the jury to disregard same, a reversal ordinarily will not be had. However, this is not true, but the contrary is true, where such remarks are of such a prejudicial nature that the effects thereof might not likely be removed by such instructions of the Court. In 2 Ruling Case Law, Page 35, concerning this proposition, it is stated:

> "While it is true that courts of last resort have frequently, though not uniformly, applied the rules stated above, yet this rule is recognized and applied by the courts in those cases only where it is made to appear by the record, from a consideration of the character of the statements made, that their prejudicial effect was probably averted by such withdrawal, and in instruction to disregard the same. (Toledo St. L. & W. R. Co. v. Burr, 82 Ohio St. 129, 92 N. E. 27, 137 A.S.R. 771; Ricketts v. Chesapeake & O. R. Co., 33 W. Va. 433, 10 S. E. 801, 25 A.S.R. 901, 7 L.R.A. 354). It is well settled that argument of counsel may be so prejudicial to the rights of the opposite party that the prejudice can not be overcome by the Court in rebuking the attorney or instructing not to regard counsel's argument in arriving at a proper solution of the case. The reviewing court will grant a new trial when such prejudice results. (Angelo v. People, 96 Ill. 209, 36 Am. Rep. 132; Brown vs. Swineford, 44 Wis. 282, 28 Am. Rep. 582, 48 Am. Rep. 336 note; 56 Am. Rep. 814 note). In this connection, it is well to consider that it is

usually impossible for the jury entirely to disregard improper and prejudicial remarks of counsel, although instructed so to do by the Court. Such remarks are fastened upon their minds and mingled with the testimony beyond possibility of separation, and necessarily receive weight in the considerations that induce the conclusion arrived at by the jury. (People v. Ah Len, 92 Cal. 382, 28 Pac. 286, 27 A.S.R. 103; Coe v. Van Why, 33 Colo. 315, 80 Pac. 894, 3 Ann. Cas. 552; Cross v. Grant, 62 N. H. 675, 13 A.S.R. 607; Bullard v. Boston & M. R. Co., 64 N. H. 27, 5 Atl. 838, 10 A.S.R. 367; People v. Fielding, 158 N. Y. 542, 53 N. E. 497, 70 A.S.R. 495, 46 L.R.A. 641, and note; Smith v. State. 44 Tex. Crim. 137, 68 S. W. 995, 100 A.S.R. 849; see also Boyd v. Portland Gen. Elec. Co., 37 re. 567, 62 Pac. 378, 52 L.R.A. 509. 58 Am. Rep. 653 note.)"

Petitioners contend that the remarks made by the Honorable Clyde O. Eastus to the effect that he had the Government witnesses in the Courtroom under guard to keep the defendants on trial from killing them like they did Jerry Seigle (a defendant who had been mysteriously killed in Chicago, and for whose death one of the defendants on trial, Tommy Stobble, had been arrested, and charges for murder were then pending against him in Chicago), clearly come within the proposition here announced, and so completely denounced by the cases cited.

The petitioner, Mrs. Phil Chadwick, earnestly urges that so much of the sentence imposed upon her on

Count 42 of the indictment to serve two years in the United States Reformatory at Alderson, West Virginia, should be set aside, independent of any other proposition in this case. She concedes it to be the law that verdicts of juries are to be liberally construed, but she says that a liberal construction of the jury's verdict in her case would be that the jury refused to find her guilty on Count 42 of the indictment. The verdict as to Mrs. Chadwick was, "We further find the defendant, Mrs. Phil Chadwick, not guilty as charged in Counts 1 to 6, "INCLUSIVE"; we further find the defendant, Mrs. Phil Chadwick, guilty in Counts 7 to 42." The only thing that we have to go by is what the jury actually said. They used the word "INCLUSIVE" in finding her not guilty of Counts 1 to 6, and in the very next breath they say "guilty in counts 7 to 42" and do not use the word "INCLUSIVE". This petitioner earnestly urge that a liberal construction of the verdict as to her would be that she was not found guilty on Count 42 of the indictment.

Under McElroy v. U. S., supra, it cannot be said that the rights of these petitioners were not prejudiced. If the Government may join in one indictment everyone suspected of crime, then the Sixth Amendment of the Constitution of the United States might well be disregarded. Petitioners earnestly urge that they were prejudiced by the errors above urged.

Wherefore petitioners pray that Writ of Certiorari issue to the United States Circuit Court of Appeals for the Fifth Circuit.

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